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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 69-5046

Supreme Court, U.S.
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E. ROBERT SEAVER, CLERK

ROBERT APODACA, *et al.*,

Petitioners,

—v.—

STATE OF OREGON,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OREGON

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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Interest of the *Amicus**

The American Civil Liberties Union, as *Amicus Curiae,* is deeply interested in the question presented by this case. How that question is answered will profoundly affect the content of two rights fundamental to all American citizens charged with committing major criminal acts: the right to jury trial and the right to a presumption of innocence until guilt is proven beyond a reasonable doubt. *Duncan* v. *Louisiana,* 391 U.S. 145 (1968); *In re Winship,* 397 U.S. 358 (1970). Because unanimity in jury verdicts is not only an essential element of both rights, but also provides the

* This brief is filed with consent of the parties. The letters of consent have been filed with the Clerk of the Court.

crucial link by which the former guarantees the latter, *Amicus* urges that the judgment of the Court of Appeals of Oregon be reversed.

Question Presented

Do the Sixth Amendment right to jury trial and the due process clauses of the Fifth and Fourteenth Amendments guarantee unanimity in jury verdicts?

Statement of the Case

The history of the case in No. 69-5046 is set forth in detail on pages 4-5 of the Brief for Petitioners. Petitioners were convicted of various felonies by the non-unanimous votes of 12-man juries, as authorized by the provisions of Article 1, Section 11 of the Oregon Constitution. On appeal, the Court of Appeals of Oregon rejected petitioners' constitutional claims, relying upon the opinion of the Supreme Court of Oregon in *State* v. *Gann*, 89 Ore. Adv. Sh. 853, 463 P. 2d 570 (1969). Review was denied by the Oregon Supreme Court.

Argument

The requirement of unanimity assures that the jury will carry out the historical functions to which it has been entrusted. It elicits the maximum amount of deliberation, and requires the full jury to consider and discuss whatever special insights each member may be able to bring to bear on the case. Without the unanimity requirement, informed discussion of the factual issues of a case might be cut short prematurely, or never reached, despite substantial disagreements over the nature or degree of guilt of the accused.

Moreover, the safeguards that community participation in juries provide against verdicts swayed by public sentiment or prejudice against unpopular or minority groups would be dangerously undercut by non-unanimous verdicts.

The unanimity requirement also is inextricably interwoven with the Constitutional standard of proof beyond a reasonable doubt. It is quite obvious that the prosecutor's burden of persuasion is lightened appreciably when less than complete agreement of the jurors is required for conviction. In a sense, an non-unanimous verdict is a contradiction in terms with the reasonable doubt standard, which, however difficult to define objectively, has been related historically to unanimity. Unanimity enhances that sense of shared community responsibility for the vital decisions entrusted to a jury that are so essential to the maintenance of the moral force of the criminal law, which lies behind the reasonable doubt standard. Cf. *In re Winship, supra.* Guilty verdicts returned over the dissent of a jury minority would undermine the confidence of individual citizens that the government will not successfully prosecute and imprison persons without proof of the utmost certainty.

For the above stated reasons, *Amicus* believes that the unanimity requirement is a procedure "necessary to an Anglo-American regime of ordered liberty," *Duncan* v. *Louisiana, supra,* 391 U.S. at 149, and therefore qualifies for protection under the Sixth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments.

I.

The Sixth Amendment right to trial by jury guarantees unanimity in jury verdicts because unanimity is essential to the historical functions of the jury.

In *Duncan* v. *Louisiana, supra,* the Court held that in major criminal cases trial by jury "is fundamental to the American scheme of justice." The Court based its decision upon the historical and functional role that jury trial has played in preventing oppression by the state:

> . . . the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. 391 U.S. at 156.

In *Williams* v. *Florida,* 399 U.S. 78 (1970), the Court considered the question whether constitutional juries must consist of twelve members. After recognizing that the number of jurors historically had been fixed, with few exceptions, at twelve, the Court found that the history of the Constitution was uncertain as to whether the requirement of twelve had been incorporated by the Sixth Amendment. The Court then applied a functional test and held that criminal juries were not constitutionally limited to twelve members:

> The relevant inquiry, as we see it, must be the function that the particular feature performs and its relation to the purposes of the jury trial. Measured by this standard, the 12 man requirement cannot be re-

garded as an indispensable component of the Sixth Amendment. 399 U.S. 78, 99-100.

It is precisely on this functional basis that the unanimity requirement must be retained. Without unanimity, the role of the jury as a deliberative body representative of a cross-section of the community and protective of the rights of unpopular defendants against the prejudices of majority public opinion would be seriously undermined. This position was implicitly recognized in the *Williams* case, *supra,* when the Court distinguished its holding regarding 12 man juries from the issue presented in the instant case:

> . . . we find little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12—*particularly if the requirement of unanimity is retained.* 399 U.S. at 100. (Emphasis supplied.)

The Court added in a footnote that unanimity, unlike the 12-man requirement, "may well serve an important role in the jury function." *Supra* at 100, fn. 46. We believe that the suggestion of this Court in the *Williams* case should be adopted as the holding in the instant case.

A. *Unanimity Assures Full and Complete Jury Deliberation.*

The primary function of a jury is to interpose the reasoned decision of ordinary citizens between the power of the state and the individual, thereby preventing the use of arbitrary power and coercion by the authorities. *Duncan* v. *Louisiana, supra.* The major risk that is run by entrusting such decisions to a jury of layman is that in-

dividual jurors, as untrained fact-finders, may be more likely to err than a trained judge. This problem is accentuated when the trial deals with issues or individuals about whom there is considerable public controversy.[1] It is to minimize these risks that juries have been structured to ensure maximum deliberation and consideration of all the intricate issues developed at trial.

> The importance of this comparison and discussion is particularly great in the case of untrained judges .... [T]he verdict ultimately represents general impressions founded on conclusions of which many are forgotten in the course of a trial; and though the value of such general impressions is often underrated, there can be no doubt that their importance depends, if not principally, at least to a great extent, on their being checked by and compared and found to correspond with, the general impressions of others. J. F. Stephen, *A General View of the Criminal Law of England* 221 (1863).

Unanimity is the primary device by which such careful deliberation is maximized. It ensures that the opinion of each member of the jury is given full and equal weight, and allows each juror to present interpretations of factual situations that might not otherwise be considered by his co-jurors. It "furnishes a safeguard against precipitancy and insures a full and adequate discussion of every question which can fairly admit of doubt." W. Forsyth, *History of Trial by Jury* 204 (2d Ed. Morgan 1875).

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[1] See *Marshall* v. *United States*, 360 U.S. 310 (1959); *Turner* v. *State of Louisiana*, 379 U.S. 466 (1965); 3 Story, *Commentaries on the Constitution* at 653.

Without unanimity, deliberation might be cut short prematurely, or be dispensed with entirely, without due consideration of the doubts and insights of a minority of the jury. The dissenting jurors may be just those who can lend a special insight into the facts of the case, or those whose strength of character enables them to see the issues objectively despite the pressures of popular opinion. See Comment, "Should Jury Verdicts Be Unanimous in Criminal Cases," 47 *Ore. L. Rev.* 417, 424 (1968). To cut short or to eliminate their opportunity to reason with their associates would be to undermine the traditional protective role of the jury.

B. *Unanimity Gives Meaning to the Requirement That Juries Reflect a Broad Cross-Section of the Community.*

Related to the protection of the jury to serve as a buffer between the accused and the state is the requirement that juries be drawn from a pool composed of a representative cross-section of the community. *Norris* v. *Alabama,* 294 U.S. 587 (1935); *Whitus* v. *Georgia,* 385 U.S. 545 (1967). This insures that the special perspectives that can be imparted to the facts and testimony of a trial by an individual from a particular ethnic, racial, or social background will not be omitted arbitrarily from the jury's deliberations.[2] It also helps assure that a defendant who is a member of an unpopular or minority group is not victimized by the possible prejudices of a jury.[3]

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[2] See Note, "The Jury: A Reflection of the Prejudices of the Community," 20 *Hastings Law Journal* 1417, 1419 (1969).

[3] A respected University of Chicago Law School study found that white jurors in criminal trials tend to be significantly more sympa-

Without the unanimity requirement, both of these safeguards would be undercut. It would be easier—perhaps commonplace—for a jury to ignore the viewpoints of minority group members.[4] Worse, a jury could convict on the basis of its prejudices in the face of exculpating evidence and over the dissent of jurors representative of the group against whom the prejudice is directed. In such a case, the community representation element of the right to jury trial would become a hollow guarantee.

C. *The Requirement of Unanimity Is Not Outweighed by Any Legitimate States Interests.*

The reasons usually advanced for abandoning unanimous jury verdicts are that it is necessary to avoid obstruction by obstinate jurors and that it relieves the state of the economic burden of retrying cases that resulted in hung juries. See, Comment, "Should Jury Verdicts be Unanimous in Criminal Cases," 47 *Ore. L. Rev.* 417 (1968). But the University of Chicago jury studies have shown that it is a rare case where a juror will prevent a verdict in the face of clear evidence:

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thetic to white than to black defendants. This is reflected in higher rates of conviction and stiffer sentences for black defendants, especially where there are no blacks on the jury. Kalven & Zeisel, *The American Jury* (1966) 210-211.

[4] Professor Zeisel has shown that "a majority verdict requirement is far more effective in nullifying the potency of minority viewpoints than is the outright reduction of a jury to a size equivalent to the majority that is allowed to agree on a verdict." Zeisel, "The Diminution of the Federal Jury," 38 *U. Chi. L. Rev.* 710, 722 (1971). For the statistical analysis underlying these conclusions, see *id.*, pp. 722-23.

> The most likely explanation for the 10:2 or 11:1 deadlocked juries is that it is a response to genuine difficulties in the case.[5]

Moreover, the frequency of hung juries is not that substantial. Only 5.6% of criminal trials result in hung juries in unanimous-verdict jurisdictions, as opposed to 3.1% in jurisdictions where unanimity is not required.[6] This represents a minor savings indeed, and any trifling economies that may be gained (such as shortened periods of jury deliberation or easier convictions) would be achieved by undermining those very functions of the jury that were so essential to this Court's decision in *Duncan* v. *Louisiana, supra.*

As Justice Black said in what is now recognized to be a classic statement:

> Trifling economies . . . . have not generally been thought sufficient reason for abandoning our great constitutional safeguards aimed at protecting freedom and other basic human rights of incalculable value. Cheap, easy convictions were not the primary concern of those who adopted the Constitution and the Bill of Rights. Every procedural safeguard they established purposely made it more difficult for the government to convict those it accused of crimes. On their scale of value justice occupied at least as high a position as economy. *Green* v. *United States,* 356 U.S. 165, 216 (1958) (dissenting opinion).

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[5] Kalven & Zeisel, "The American Jury: Notes for an English Controversy," 48 *Chi. Bar Rec.* 195, 201 (1967).

[6] *Id.* at 200. Kalven & Zeisel, *The American Jury, supra* at 453, 461.

II.

Unanimity in jury verdicts is required to effectuate the reasonable doubt standard of guilt, which is embodied in the due process clauses of the Fifth and Fourteenth Amendments.

The Court has held that due process requires that "society . . . should not condemn a man for commission of a crime when there is reasonable doubt about his guilt." *In re Winship, supra,* 397 U.S. at 363-64. The unanimity requirement is an essential ingredient of this right, and assures that the standard will be correctly applied.

A. *Unanimity Insures That Each Individual Juror Will Apply the Reasonable Doubt Standard.*

Jury deliberation enables the members to gain exposure to the insights of their co-jurors. Thus, each juror may be confronted with an analysis of the factual issues that he would not have entertained on his own.

This jury dynamic gives meaning to the reasonable doubt standard; it provides the juror, an untrained layman, with a broad perspective so that in his deliberations he may more nearly approximate the law's standard of a "reasonable man". Without such exposure, the juror would be likely to consider only *his* doubts, rather than all reasonable doubts, in deciding the issue of guilt.

Unanimity serves as the vital mechanism by which the reasonable doubt standard is applied by each individual juror. Without unanimity, the full and meaningful deliberation that is essential to the reasonable doubt standard would be cut short or eliminated. (Compare *supra,*

pp. 5-7.) Justice Goodwin of the Supreme Court of Oregon recognized this process in dissenting from that Court's opinion in *State* v. *Gann,* 89 Ore. Adv. Sh. 853, 463 P.2d 570 (1969), which upheld the Oregon statute at issue here:

> [The unanimity rule] undoubtedly decreases the likelihood of precipitancy and increases the opportunity for a full and adequate discussion of every issue about which there is a reasonable doubt . . . Thus, because it requires the concurrence of the unimpassioned and the unprejudiced, unanimity increases the likelihood that the guilt of the accused will truly be established beyond a reasonable doubt. 463 P.2d at 584.

B. *Unanimity Precludes a Conviction Unless the Jury as a Whole Entertains No Reasonable Doubt of the Guilt of the Accused.*

Each juror in a criminal trial is the equal of his co-jurors and is as likely as they to embody the standard of the "reasonable man." Thus, as long as one juror votes for acquittal, there is a reasonable doubt of guilt; that one dissenting vote can no more be dismissed as unreasonable than can the eleven votes of the majority.

> . . . The unanimity of a verdict in a criminal case is inextricably interwoven with the required measure of proof. To sustain the validity of a verdict by less than all the jurors is to destroy this test of proof for there cannot be a verdict supported by proof beyond a reasonable doubt if one or more jurors remain reasonably in doubt as to guilt. It would be a contradiction in terms . . .

Hibdon v. *United States,* 204 F.2d 834, 838 (6th Cir. 1953). Accord: *United States* v. *Fioravanti,* 412 F.2d 407, 418-419 (3d Cir. 1969); *Billeci* v. *United States,* 184 F.2d 394, 403 (D.C. Cir. 1950).

It has been claimed that the *Hibdon* case confused the application of the reasonable doubt standard, and that that standard properly is applicable only to the individual decisions of each juror and not to the decision-making of the jury as a unified body. Comment, "Waiver of Jury Unanimity—Some Doubts About Reasonable Doubt," 21 *U. Chi. L. Rev.* 438 (1954). But this distinction contradicts historical experience. The reasonable doubt standard has been applied in the context of recognition of the right to unanimous verdicts in jury trials.[7] This is not coincidence; unanimity has been a tacit assumption underlying the use of the reasonable doubt standard in jury trials.

Moreover, the criticism of the *Hibdon* case does not hold up analytically. The reasonable doubt standard is closely related to the prosecution's burden of persuasion in criminal trials; it "provides concrete substance for the presumption

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[7] The "demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, [although] its crystallization into the formula 'beyond a reasonable doubt' seems to have occurred as late as 1798." C. McCormick, *Evidence* §321, pp. 681-682 (1954).

The unanimity rule dates back to at least the latter third of the fourteenth century—*Anonymous Case,* 41 *Lib. Assisarum* 11—and was recognized by all the authors of the major common law treatises, 4 W. Blackstone, *Commentaries on the Laws of England* (1765) 349-350 (Cooley ed. 1899); Matthew Hale, *The History of the Common Law of England* (1713) at 261 and 263; 1 J. Chitty, *A Practical Treatise on the Criminal Law* (1816) at 635-36; 3 J. Story, *Commentaries on the Constitution of the United States* (1833) at 652, and by the decisions of this Court. See *Andres* v. *United States,* 333 U.S. 740 (1948); *Thompson* v. *Utah,* 170 U.S. 343 (1898) (dictum); *Patton* v. *United States,* 281 U.S. 276, 288 (1930) (dictum).

of innocence . . . " *In re Winship, supra* at 363. It is "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship, supra* at 372 (concurring opinion of Justice Harlan). Particularly in view of this Court's decision in *Williams* v. *Florida, supra,* that 12-man juries are not constitutionally required, it is essential that unanimity be maintained to protect against erosion of that principle. To do away with unanimity obviously would lessen the burden of the prosecution. As Justice Harlan noted in *Williams,* "Can it be doubted that a unanimous jury of 12 provides a greater safeguard than a majority vote of six?" 399 U.S. at 126.

C. *Jury Unanimity Is Essential to Public Confidence in the Judicial System.*

The utility and legitimacy of any legal system is directly related to the degree of public confidence in the way in which that system works. If citizens believe that the law is merely an extension of the sovereign power and can be used to imprison people at the arbitrary whim of the state, then they will be unwilling to entrust disputes between themselves and the government to settlement by the courts. Even if citizens do submit to the judicial power, such beliefs would embitter the political climate of the nation.

Considerations such as these partly lay behind this Court's decision in *In re Winship:*

> Moreover, use of the reasonable-doubt standard is indispensible to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be

> diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of his guilt with utmost certainty. 397 U.S. at 364.

Unanimity is probably the most important element of the reasonable doubt standard in sustaining the legitimacy of the criminal law in the eyes of the public. A layman may be unclear as to the differences between proof beyond a reasonable doubt and proof by a preponderance of the evidence, but he can understand that one cannot be convicted and incarcerated for a crime without the unanimous concurrence of twelve of his peers. Unanimous verdicts lend an air of moral certainty to factual decisions. Were people to be condemned over the dissent of jurors, it would raise grave doubts that the decision to convict was the right one.

Thus, it is particularly disturbing that split verdicts are rendered in at least 25% of the criminal cases in Oregon. Kalven & Zeisel, "The American Jury: Notes for an English Controversy," 48 *Chi. Bar Rec.* 195, 201 (1967). Public disagreement over the decisions of criminal juries in such a high ratio of cases is bound to have an adverse effect on public confidence that justice is being done. Moreover, as the statistics of the Chicago jury study show,[8] the overwhelming majority of the split verdict in Oregon could ultimately be resolved by unanimous verdict.

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[8] See commentary accompanying fn. 6, p. 9, *supra*.

CONCLUSION

The requirement of unanimity is an essential element of the constitutional rights to a jury trial and to the reasonable doubt standard of guilt in criminal trials. It has been historically recognized for centuries at common law. There are no important state interests to justify its abandonment.

For these reasons, *Amicus* respectfully urges that the decision of the Court of Appeals of Oregon be reversed.

Respectfully submitted,

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